No. 17-801

IN THE

Supreme Court of the United States

In re: United States of America, *et al.*,

On Petition for a Writ of Mandamus to the United States District Court for the Northern District of California

BRIEF AMICI CURIAE OF NATURAL RESOURCES DEFENSE COUNCIL, INC., AND PUBLIC CITIZEN, INC., IN OPPOSITION TO THE PETITION FOR WRIT OF MANDAMUS

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INTERESTS OF AMICI CURIAE

Amici curiae Natural Resources Defense Council, Inc. (NRDC), and Public Citizen, Inc. (Public Citizen), submit this brief to assist the Court in understanding how a narrowing construction of the Administrative Procedure Act's "whole record" judicial-review requirement would impair the judiciary's ability to check federal agencies' abuses of authority.[1]

NRDC is a nonprofit advocacy group that works to protect health and the environment. Since its founding in 1970, NRDC has litigated hundreds of cases in which the court reviewed agency action based on an administrative record. NRDC has prosecuted some of these cases against federal agencies; others it has litigated alongside those agencies, defending their actions. In both contexts, the integrity of the judicial review process depends on the court and all parties having access to an administrative record that fully, fairly, and accurately reflects the agency's proceedings.

Public Citizen is a nonprofit consumer advocacy organization that appears on behalf of its

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[1] All parties have consented in writing to the filing of this brief. Under the circumstances, it was not possible to give ten days' notice pursuant to Rule 37.2. However, counsel for amici curiae provided notice to all parties on December 11, 2017, the first business day after this Court's order directing responses to the petition for writ of mandamus to be filed by December 13, 2017.

This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief.

nationwide membership before Congress, administrative agencies, and the courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes. Since its founding in 1971, Public Citizen has litigated numerous cases in which the court reviewed agency action based on an administrative record. Like NRDC, Public Citizen has done so both as the plaintiff or petitioner, challenging agency action, and as an amicus, supporting agency actions. Public Citizen thus has a strong interest in and is well suited to speak to the issue before the Court in this case.

SUMMARY OF THE ARGUMENT

Petitioners claim that federal courts should review informal agency action based not on the whole record of the agency action, 5 U.S.C. § 706, but on a partial, and potentially sanitized, record. Their approach would disregard the text and structure of the Administrative Procedure Act (APA), and would eviscerate this Court's long-settled precedent that a reviewing court must consider not only record material that supports an agency, but also record material that undercuts it. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951).

The administrative-record limitations for which Petitioners advocate would impair judicial review of actions taken by almost every federal agency, under myriad statutes. That, in turn, would transfer power from the judicial to the executive branch, impeding litigation to hold agencies accountable by both the beneficiaries of regulation and those who are regulated. The highly politicized context of this case

should not obscure these implications of Petitioners' approach.

1. Section 10 of the APA generally provides for judicial review of "agency action" on "the whole record." 5 U.S.C. § 706. Nothing in this language or in the statute's structure or history suggests that a federal agency may unilaterally exclude from this record documents that it does not wish to include—even though the documents were before the agency, considered by agency staff, and available to the agency's ultimate decisionmaker when she made her decision. Judicial review on the "whole record" of the "agency action," 5 U.S.C. § 706, necessarily requires the *whole* record.

The nature of the reviewing court's task explains why Congress specified whole-record review. The APA's arbitrary-or-capricious standard requires a court to assess whether the agency based its decision on the relevant factors, explained its decision in a way that comports with "the evidence before [it]," and offered a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). To effectively undertake these tasks, a reviewing court must have access to the entire record of the agency's action, not just materials that the agency's ultimate decisionmaker directly reviewed and that are otherwise public.

This Court long ago rejected the conceit that an agency may present for judicial review just those documents that the agency wants the court to consider. *See Universal Camera*, 340 U.S. at 487-88.

The reason is self-evident: "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488. "The fact that defendants presented documents that seemed to support the rationality of their actions does not mean that the same conclusion would have been reached if the Court had been aware of other information that was before the agency." *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982). Judicial review on "less than the full administrative record might allow a party to withhold evidence unfavorable to its case." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

Consistent with these principles, courts of appeals have held that the "whole record" of an informal "agency action," 5 U.S.C. § 706, encompasses information and documents that were before the agency when it made its decision, whether those documents were considered directly by the ultimate decisionmaker, or indirectly through agency staff. *See, e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Petitioners fail to identify any substantial disruption of agency prerogatives resulting from these longstanding precedents. To be sure, they complain about the *deadline* the district court here imposed for production of the administrative record, but a deadline grievance in a particular case can hardly justify taking a judicial knife to the APA's "whole record" standard.

Although plain enough on its own, the relevant statutory language (the "whole record" of the "agency action") can be most clearly understood "with a view to [its] place in the overall statutory scheme." *Davis v.*

Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989). Effective judicial review under the APA depends upon an administrative record sufficient to allow a court to apply the standards this Court announced in *Motor Vehicle Manufacturers*. 463 U.S. at 42-43. Those standards require the reviewing court to have access to more than just the already-public documents directly considered by the agency's head; to do its job, the court must have access to the full record of the agency's proceeding. A "contrary approach" would "render judicial review generally meaningless" and contravene courts' duty to "ensure that agency decisions are founded on a reasoned evaluation 'of the relevant factors.'" *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted).

2. Although Petitioners contend that reviewing courts have no business examining their deliberations, judicial review of agency action under the APA requires a court to look beyond the agency's own presentation. *See Motor Vehicle Mfrs.*, 463 U.S. at 42-43; *Universal Camera*, 340 U.S. at 488. That Congress required courts to look to what the agency *actually* considered and had before it is unsurprising, for when Congress enacted the APA, courts had not yet even recognized a deliberative-process privilege. The courts' subsequent recognition of such a privilege, *see Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944-47 (Ct. Cl. 1958), does not negate Congress's decision to require agency administrative records sufficient to allow meaningful judicial review.

There of course may be circumstances in which deliberative materials need not be disclosed. But the deliberative-process privilege is a *qualified* protection, intended to improve "the quality of agency decisions."

FTC v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984); *see, e.g.*, *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 643 F. Supp. 2d 439, 442-43 (S.D.N.Y. 2009). There are competing concerns, manifest in the APA, "in opening for scrutiny the government's decision making process," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), and "ensuring the rationality and fairness" of agency decisions, *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979).

Given the qualified nature of the deliberative-process privilege, it has long been recognized that "[a] litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *Warner Commc'ns*, 742 F.2d at 1161; *see Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977); *cf. United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 658 (6th Cir. 1976) (applying a balancing test to evaluate a deliberative process claim in discovery). Nothing in the APA's "whole record" review standard hints that Congress intended to exempt from this balancing all deliberative documents that would otherwise properly be part of the agency record.

Thus, if an agency wishes to exclude documents from the record on judicial review as deliberative-process privileged, the agency must show why its interest in keeping specific documents nonpublic outweighs "society's interest in the accuracy and integrity of factfinding, and the public's interest in honest, effective government." *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). Absent such a showing, the documents should

remain part of the "whole record" before the reviewing court.

ARGUMENT

I. Judicial review under the Administrative Procedure Act requires courts to have access to the "whole record" of the agency action

The APA's arbitrary-or-capricious standard, *see* 5 U.S.C. § 706(2)(A), requires the court to decide, among other things, whether the agency based its decision on the relevant factors, explained its decision in a way that "runs counter to the evidence before [it]," or failed to offer a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*, 463 U.S. at 42-43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). The court must also determine whether the agency considered and responded to significant comments received from the public. *See* 5 U.S.C. § 553(c); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Courts' "searching and careful" review of these issues, *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), must generally be conducted on "the whole record or those parts of it cited by a party," 5 U.S.C. § 706.

Effective judicial review is critical to the equilibrium of power among the three branches of government, for it depends on the courts being able to do their job. Congress passed the APA "against a background of rapid expansion of the administrative process," *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950), "to ensure that agencies follow constraints even as they exercise their powers," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and in the judgment). Congress "subjected [agency] decisions to

judicial review" for the same reason. *Id.* "[I]t would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the [APA] warrant, to give effect to its remedial purposes." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

A court that does not have the whole record obviously cannot "carefully review[] the record and satisfy[] [itself] that the agency has made a reasoned decision based on [the agency's] evaluation of the [evidence]." *Marsh*, 490 U.S. at 378. For example, a court cannot assess whether an agency decision "runs counter to the evidence," *Motor Vehicle Mfrs.*, 463 U.S. at 43, without having *all* the evidence. And, without knowing what factors the agency actually considered, a court cannot evaluate whether the agency based its decision on the relevant factors, or instead on impermissible ones. *See Nat. Res. Def. Council v. U.S. EPA*, 658 F.3d 200, 216-18 (2d Cir. 2011) (finding an agency decision arbitrary where it failed to explain how it effectuated a statutory factor); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1248-49 (D.C. Cir. 1971) (holding that an agency decision based on political pressure would be impermissible); *see also Aera Energy LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011) (similar); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 763, 768-69 (9th Cir. 2007) (affirming holding that an agency relied on factors that Congress had not intended it to consider).

To fairly and accurately do its job, a reviewing court should therefore "have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792; *see also Dopico*, 687 F.2d at 654. Anything less

would allow an agency to "skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question." *Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978). An "incomplete record" is little more than a "'fictional account of the actual decisionmaking process.'" *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1538 (9th Cir. 1998) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977)). Congress specified "whole record" review of agency action to prevent such fictions. *See* S. Rep. No. 79-752, at 214 (1945).

That the record of the agency's actual decisional process should be before the reviewing court is what *Camp v. Pitts* meant in stating that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[2] 411 U.S. 138, 142 (1973) (per curiam). The record "already in existence," *id.*, is the record of the agency's actual proceeding, regardless of whether the agency includes that material in the "record" it lodges with the court. *Dopico*, 687 F.2d at 654; *accord Thompson*, 885 F.2d at 556 (stating that the administrative record is "not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record" (citation omitted)). If the agency does not actually provide that "whole record," 5 U.S.C. § 706, then the

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[2] A court need not find bad faith to determine that the record is incomplete. *Contra* Pet. 20. When, as here, an agency misapprehends what an administrative record must include, the agency's own explanation of what it excluded may suffice to establish the record's incompleteness.

reviewing court may order the record completed. *See Dopico*, 687 F.2d at 654; *Pub. Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982) (Kennedy, J.).

To be sure, other than in formal proceedings, *see* 5 U.S.C. § 556(e), the specific documents that "constitute[] . . . the administrative record may be very unclear." *Suffolk Cty.*, 562 F.2d at 1384 n.9. In principle, the record includes the agency's "informational base" when it made its decision. *Dopico*, 687 F.2d at 654. That base encompasses "everything that was before the agency pertaining to the merits," *Portland Audubon Soc'y*, 984 F.2d at 1548, or more specifically, "all documents and materials directly or indirectly considered by the agency," *Bar MK Ranches*, 994 F.2d at 739.

Informal agency proceedings, such as most agency rulemakings, often take years to complete. Dozens of agency staff, trained in a range of disciplines, may work on a matter. Trade associations, academics, advocacy groups, and private citizens may submit substantial comments that the agency must investigate. At the end of this process, an administrative record may encompass public

comments;[3] draft reports;[4] briefing books;[5] internal analyses;[6] staff recommendations;[7] communications and concerns of agency staff;[8] the views of sister agencies;[9] economic studies;[10] and internal or nonpublic scientific evaluations.[11] The resulting record may seem like "a melange of written

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[3] *See, e.g.*, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1473-74 (9th Cir. 1994).

[4] *See, e.g.*, *Am. Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990); *Miami Nation of Indians of Ind. v. Babbitt*, 979 F. Supp. 771, 778 (N.D. Ind. 1996).

[5] *See Nat. Res. Def. Council, Inc. v. Train*, 519 F.2d 287, 291 (D.C. Cir. 1975).

[6] *See, e.g.*, *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153, 1156, 1162 (9th Cir. 1980).

[7] *Suffolk Cty.*, 562 F.2d at 1385; *Bersani v. U.S. EPA*, 674 F. Supp. 405, 410 (N.D.N.Y. 1987).

[8] *See, e.g.*, *Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1136 (9th Cir. 2016); *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1264-65 (10th Cir. 2011); *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1130 (D. Or. 2002).

[9] *See Pritzker*, 828 F.3d at 1136-37 (referring to concern voiced by Marine Mammal Commission).

[10] *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 801-02, 807 (9th Cir. 2005); *Hughes River Watershed Conservancy v. U.S. Forest Serv.*, 81 F.3d 437, 446-47 (4th Cir. 1996).

[11] *See, e.g.*, *Pritzker*, 828 F.3d at 1136-40; *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 479, 497-98 (9th Cir. 2011); *Arkla Exploration Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 358, 360 (8th Cir. 1984); *Asarco*, 616 F.2d at 1162; *Tenn. Valley Ham Co. v. Bergland*, 493 F. Supp. 1007, 1017, 1019-20 (W.D. Tenn. 1980).

statements, letters, reports, and similar materials received outside the bounds of the oral hearing." *Indus. Union Dep't, AFL-CIO v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974). While such records are not always tidy, they have the advantage of reflecting the agency's actual, if informal, proceedings.[12]

Given the scope and complexity of regulatory agencies' work, informal rulemaking records sometimes span tens of thousands of pages or more.[13]

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[12] To the extent that Petitioners suggest that the administrative record in informal agency rulemakings and adjudications includes only materials that would be included in the record of a *formal* APA rulemaking or adjudication, *see* Pet. 28-29; 5 U.S.C. § 556(e), they misunderstand the APA's statutory scheme. Formal APA proceedings are subject to requirements—including a prohibition on *ex parte* communications, 5 U.S.C. § 557(d)(1)(A); a right to call and cross-examine witnesses, *id.* § 556(d); and transcribed hearings, *id.* § 556(e)—that do not apply to informal proceedings. Consistent with these trial-like procedures, the APA provides that the "record" for formal proceedings includes only the transcript, exhibits, and materials "filed in the proceeding." *Id.* Informal proceedings are subject to none of these constraints, and Congress chose not to apply the same definition of the record to them, either. *See id.* §§ 553(c), 556(e).

[13] *See, e.g.*, *Georgia ex rel. Olens v. McCarthy*, 833 F.3d 1317, 1320 (11th Cir. 2016); *Texas v. EPA*, 499 F.2d 289, 297 (5th Cir. 1974); *Hyatt v. U.S. Patent & Trademark Office*, 146 F. Supp. 3d 771, 774 (E.D. Va. 2015); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1044 (N.D. Cal. 2015); *Amigos Bravos v. U.S. Bureau of Land Mgmt.*, No. 09-00037, 2011 WL 7701433, at *3 n.2 (D.N.M. Aug. 3, 2011); *Phippsburg Shellfish Conservation Comm'n v. U.S. Army Corps of Eng'rs*, 800 F. Supp. 2d 312, 314 n.1 (D. Me. 2011); *Bonnichsen*, 217 F. Supp. 2d at 1120 n.2.

It is inconceivable that federal agency heads could personally review all this material. Agencies employ large numbers of scientists, economists, and other professionals to do the work that Congress charged them with doing, precisely because the agency's ultimate decisionmakers lack the ability to do all that work by themselves. Yet, under Petitioners' theory, any material an agency's staff considers but does not provide directly to the final decisionmaker must be omitted from the administrative record.[14] Petitioners even go so far as to suggest that including such material in the record would be an "extraordinary departure" from the established norms governing judicial review of federal agency action. Pet. 5.

Petitioners' characterization cannot be squared with lower courts' longstanding reliance on such material through decades of administrative-law jurisprudence. *See supra* notes 3-11; *infra* note 16. Nor can Petitioners' argument be reconciled with the Department of Justice's own direction to federal

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[14] The impracticality of Petitioners' approach is demonstrated by the fact that it would either require an agency decisionmaker to review every substantial public comment received, or require the agency to omit those public comments from the administrative record. The former approach would often be literally impossible, given the volume and technical nature of such comments, and the number of informal agency actions. The latter approach would negate the APA's requirement that agencies consider and respond to public comments, 5 U.S.C. § 553(c), preventing judicial review of the adequacy of an agency's responses. *See, e.g., La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003); *Am. Mining Congress*, 907 F.2d at 1187-88.

agencies, from at least 1999, that "[t]he administrative record consists of all documents and materials directly or *indirectly* considered by the agency decisionmaker" (emphasis added), and "[i]nclude[s] documents and materials that were before the agency at the time of the challenged decision, even if they were not specifically considered by the final agency decisionmaker."[15]

Petitioners now attempt to recharacterize the Department of Justice's guidance as reflecting nothing more than a voluntary "cho[ice] to include more [in the administrative record] than the law requires." Pet. 25. But the APA provides for judicial review on the "whole record" of the "agency action"—and *only* that record. 5 U.S.C. § 706. If the documents that the Department of Justice has been instructing federal agencies to include in administrative records (and that those agencies have for years included) were not properly part of the "whole record" of the "agency action," then the documents should not have been placed before the courts at all. The APA does not give federal agencies one-sided authority to supplement the administrative record with whatever material they think helps their case. An agency properly includes such material in the record only because the material is part of the "whole record" of the agency action.

Petitioners' complaint about the burden of compiling comprehensive administrative records is similarly belied by both the Department of Justice's guidance and agencies' longstanding practice. The

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[15] U.S. Dep't of Justice, Env't & Nat. Res. Div., *Guidance to Federal Agencies on Compiling the Administrative Record* 1-2 (Jan. 1999), http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf.

many cases in which agencies have compiled voluminous records, *see, e.g.*, *supra* note 13, suggest that the burdens of which Petitioners now complain have proven manageable. Compliance with the APA may "cause inconvenience and added expense" for agencies, but "Congress has determined that the price for greater fairness is not too high." *Wong Yang Sung*, 339 U.S. at 46-47.

II. If an agency wishes to exclude deliberative materials from an administrative record, it must specifically assert and justify the claim of privilege

Judicial review under the APA may and sometimes *must* probe agency deliberations. The reviewing court must decide whether the agency "failed to consider an important aspect of the problem," "offered an explanation for its decision that runs counter to the evidence before the agency," or made no "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs.*, 463 U.S. at 43-44. In answering these questions, courts often consider internal documents that evaluate evidence, discuss recommendations, reveal disagreements among staff, and otherwise disclose agency deliberations.[16] *See supra* notes 3-11. Indeed, candid,

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[16] *See, e.g.*, *Pritzker*, 828 F.3d at 1136-40 (agency scientists' analysis and recommendation); *Nat. Res. Def. Council v. U.S. EPA*, 808 F.3d 556, 570 (2d Cir. 2015) (agency advisory committee reports); *W. Watersheds Project*, 632 F.3d at 479, 497 (agency scientists' analyses); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 768-69 (9th Cir. 2007) (agency "internal memoranda," "briefing packet," and "talking points"); *Ocean Advocates v. U.S. Army*

internal agency documents are a core part of the "whole record," 5 U.S.C. § 706, and critical to a "searching and careful" judicial inquiry. *Citizens to Pres. Overton Park*, 401 U.S. at 416.

Nothing in the APA's text or history suggests that Congress intended to enfeeble judicial review by excluding such material from the "whole record" of agency action on which judicial review proceeds. Indeed, the courts did not even recognize a deliberative-process privilege until more than a decade after Congress adopted the APA's "whole record" judicial-review standard. *See Kaiser Aluminum & Chem. Corp.*, 157 F. Supp. at 945-46; *see*

Corps of Eng'rs, 402 F.3d 846, 862-63 & n.4 (9th Cir. 2005) (agency emails); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1218 (9th Cir. 2004) (internal agency memo); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1396 (9th Cir. 1995) (provisional draft); *Suffolk Cty.*, 562 F.2d at 1385 (internal decision options document); *Tummino v. Torti*, 603 F. Supp. 2d 519, 547-48 (E.D.N.Y. 2009) (draft minutes of internal agency meeting); *Nat. Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322, 372 (E.D. Cal. 2007) (interagency emails); *Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1183-85 & n.19, 1190-93 & n.28 (W.D. Wash. 2006) (agency staff emails, draft letters, meeting minutes, and notes); *Defs. of Wildlife v. Kempthorne*, No. 04-1230, 2006 WL 2844232, at *11 n.8 (D.D.C. Sept. 29, 2006) (agency staff email); *Nat. Res. Def. Council v. Rodgers*, 381 F. Supp. 2d 1212, 1236 n.41, 1239-40 & nn.47, 52, 1244-45 (E.D. Cal. 2005) (agency staff emails and similar internal correspondence); *Ctr. for Biological Diversity v. Evans*, No. 04-04496, 2005 WL 1514102, at *5 (N.D. Cal. June 14, 2005) (agency memos and draft rule never released to public); *Bonnichsen*, 217 F. Supp. 2d at 1130 (internal agency communications and meeting minutes); *Miami Nation*, 979 F. Supp. at 778 (draft reports and agency notes and logs); *Am. Mining Congress v. U.S. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990); *Bersani v. U.S. EPA*, 674 F. Supp. 405, 410 (N.D.N.Y. 1987) (internal agency recommendation).

also Marriott Int'l Resorts, L.P. v. United States, 437 F.3d 1302, 1304 & n.1 (Fed. Cir. 2006). And the privilege that the courts did later recognize is a qualified one. *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000); *Warner Commc'ns*, 742 F.2d at 1161.

The purpose of the deliberative-process privilege is to protect agency documents from discovery "so that the public will benefit from more effective government." *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. at 582. That justification is "attenuated," however, when "the public's interest in effective government would be furthered by disclosure," *id.*, such as where a court reviews the agency action for lawfulness. After all, Congress thought that the public interest would be best served by judicial review on the "whole record" of the agency action. Thus, although the deliberative-process privilege has its place, the interests the privilege serves do not inevitably outweigh a court's need to consider materials "germane to the [agency] decision and not duplicated elsewhere in the record." *Suffolk Cty.*, 562 F.2d at 1384; *see Warner Commc'ns*, 742 F.2d at 1161; *cf. Leggett & Platt*, 542 F.2d at 658 (applying balancing test to invocation of deliberative-process privilege in discovery); *In re Grand Jury Subpoena Dated Aug. 9, 2000*, 218 F. Supp. 2d 544, 553 (S.D.N.Y. 2002) ("The deliberative process privilege is qualified; it may be overcome by a showing of need . . . .").

The divided decision in *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), provides no persuasive argument to the contrary. That case arose from a formal adjudication conducted by the Nuclear Regulatory Commission. *See id.* at 29 (citing

42 U.S.C. § 2239(a)). To protect the "frank deliberations of Commission members" in this trial-like proceeding, the court refused to supplement the record with a transcript of the Commissioners' closed-door deliberations. 789 F.2d at 44; *see also id.* at 45-46 (Mikva, J., concurring). That refusal is best understood as a particularized determination that the need for disclosure in that case was outweighed by the harm that would flow from disclosing a transcript of deliberations "analogous to the internal mental processes of the sole head of an agency." *In re United States*, No. 17-72917, 2017 WL 5505730, at *5 (9th Cir. Nov. 16, 2017).

San Luis Obispo Mothers did not address the contents of administrative records in *informal* agency proceedings (which are not subject to the same procedural requirements as formal adjudications, *see supra* note 12, or the same narrow definition of "record," 5 U.S.C. § 556(e)). Nor did the case hold that agencies may unilaterally exclude deliberative-process materials from agency records, without expressly justifying the exclusion.

When Petitioners claim that including deliberative materials in an administrative record is akin to "probing the mental processes" of the ultimate decisionmaker through a deposition, they misapprehend the deliberative-process doctrine's reach. Pet. 27 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)). The deliberative-process privilege can sweep in a wide array of existing agency documents that, collectively, represent a contemporaneous, written record of the agency doing its work. *See Warner Commc'ns*, 742 F.2d at 1161 (stating that the deliberative-process privilege applies

to any document that is predecisional and "deliberative in nature, containing opinions, recommendations, or advice about agency policies"). Including these documents in an administrative record is a far cry from allowing the deposition of the Secretary of Agriculture, as sought in *Morgan*. *Id.* This Court should not join Petitioners in conflating the question what agency documents an administrative record encompasses with concerns about the appropriateness of deposing a Cabinet Secretary about his mental processes.

In their attempt to extend *Morgan* into a rule that all predecisional, deliberative documents are automatically excluded from administrative records, Petitioners would turn the qualified deliberative-process privilege into an absolute privilege—and then immunize their assertions of that privilege from judicial scrutiny. The possibilities for mischief in this approach are disturbing. Federal agencies often *do* include deliberative materials in their agency records. *See, e.g., Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 928 (D.C. Cir. 2017) (internal, predecisional agency memo analyzing the evidence before the agency); *Wyoming*, 661 F.3d at 1264-65 (inter-agency comments); *cf. Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1082-83 (D.C. Cir. 2001) (declaration of the agency decisionmaker intended to explain his decision). Indeed, Petitioners now seem to claim affirmatively that an agency can "choose" to include deliberative material in the record for judicial review whenever the agency wants to use those materials to defend its decision. Pet. 25.

Allowing an agency to unilaterally decide when deliberative materials are included or excluded from

the record for judicial review would allow the agency to withhold only that evidence "unfavorable to its case." *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792. This Court has long warned against reviewing just one side of the administrative record, however. *Universal Camera*, 340 U.S. at 488; *see also City of Dana Beach v. Fed. Aviation Admin.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (stating that the record supplied by the agency may be supplemented where the agency excluded documents adverse to its decision, background information is needed to determine whether the agency considered all the relevant factors, or the agency failed to explain its action so as to frustrate judicial review). Yet Petitioners' approach would give agencies the power to create one-sided records that shield their decisions from effective judicial scrutiny, with no need to justify particular withholdings. This approach would strip judges of the ability to carry out the reviewing function that Congress assigned to them. *See Dopico*, 687 F.2d at 654.

Agencies that wish to withhold deliberative materials as privileged should do so expressly, "to permit courts and other parties to 'test[ ] the merits of the privilege claim." [17] *EEOC v. BDO USA, LLP*, __ F.3d __, No. 16-20314, 2017 WL 5494237, at *4 (5th Cir. Nov. 16, 2017) (alteration in original) (citation omitted). After all, the deliberative-process privilege is qualified; it generally applies only where "the

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[17] Unlike in *Cheney v. U.S. District Court*, 542 U.S. 367, 381 (2004)— where the extraordinary circumstance of discovery sought directly from the Vice President eliminated any need to claim privilege with particularity—there is nothing extraordinary in asking an agency either to produce the "whole record," or to explain why it has not.

consequences of disclosure of the information," *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 405 n.11 (D.C. Cir. 1984), outweigh the public interest in fair and accurate judicial review, *see Citizens to Pres. Overton Park*, 401 U.S. at 416; *Walter O. Boswell Mem'l Hosp.*, 749 F.2d at 792; *Suffolk Cty.*, 562 F.2d at 1384; *cf. United States v. Nixon*, 418 U.S. 683, 706 (1974) (rejecting executive-privilege claim based "solely on the broad, undifferentiated claim of public interest in the confidentiality of . . . conversations" between presidents and advisors).

Empowering agencies to silently exclude from the record probative deliberative material, without allowing the privilege assertion to be tested, would make the agency itself the arbiter of such privilege claims. Agency invocations of privilege are not infallible, however, *see, e.g.*, *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 358 (2d Cir. 2005); *Charles v. City of New York*, No. 11-0980, 2011 WL 5838478, at *2-3 (E.D.N.Y. Nov. 18, 2011), and the resolution of qualified privilege claims is a traditional judicial function. It is not "clear and indisputable" error, *Cheney*, 542 U.S. at 381 (internal quotation marks omitted), for a reviewing court to require an agency to justify its decision to exclude documents as privileged in these circumstances. To the contrary, courts must have appropriate tools to ensure that agencies are not deploying the deliberative-process privilege in a manner that defeats effective judicial review on the "whole record" of the agency action. 5 U.S.C. § 706.

CONCLUSION

This Court should deny the petition.

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